

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 98-0026

Responsible Officer Assessment

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Sales, Use, Food & Beverage Tax

For The Period: 1991 Through 1994

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales, Food & Beverage Tax – Responsible Officer Assessment

Authority: IC 6-2.5-2-1; IC 6-8.1-5-1

The taxpayer protests the imposition of a responsible officer assessment on drinks recorded by the taxpayer using the "promo key".

II. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-1 & 2

The taxpayer protests the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

In November 1996, sales tax and food and beverage tax liabilities were assessed against a local bar because of discrepancies between actual sales reported for those taxes and sales listed on the ABC affidavit submitted to the Alcoholic Beverage Commission. The taxpayer protests his responsible officer assessment that resulted from Department's investigation. The taxpayer agrees with the Department's audit investigation and assessment except for sales made and accounted for by using a promotional key (promo key) on its cash registers.

Additional facts will be provided below as necessary.

I. Sales, Food & Beverage Tax – Responsible Officer Assessment

DISCUSSION

The taxpayer protests the imposition of a responsible officer assessment on drinks recorded by the taxpayer using the "promo key". The taxpayer does not dispute the fact that he was a responsible officer, only the amount of Department's assessment. The taxpayer argues that few, if any, drinks were given away. Instead the "promo key" was used as part of the bar's inventory control system. In order to keep control of inventory, the taxpayer's business used a system whereby everything that "went over the bar" was recorded on the cash register. The taxpayer contends that if everything that went over the bar was recorded on the cash register and there was an inventory shortage, it could be concluded that there was a theft of inventory. The taxpayer alleges "promo key" was used to record broken bottles, spilled drinks, wrong orders, and patrons leaving without paying.

The Department determined from the taxpayer's records that the average amount of sales recorded on the "promo key" per month amounted to \$4,056.89. If one estimates that 70% of this amount is for beer and 30% for mixed drinks this equates to \$1,136 and \$304 per month respectively. According to the taxpayer, beer was sold for \$2.75 and if mixed drinks were sold for approximately \$4.00 a piece, then approximately 1,136 beers and 304 mixed drinks were spilled each month. The taxpayer states that these numbers may appear inflated because if a liquor bottle was spilled then 20 to 30 drinks were accounted for on the "promo key". According to the taxpayer each drink was accounted for separately. The taxpayer also states that approximately 500 to 600 patrons frequented the bar each weekend. The taxpayer failed to provide any documentation to support its protest. The Department finds too many inconsistencies between the taxpayer's statements and the actual numbers.

Pursuant to IC 68.1-5-1(b), "...The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made". The taxpayer has not overcome his burden of proof. Therefore, the taxpayer's protest is denied.

FINDING

The taxpayer's protest is denied.

II. Tax Administration - Penalty

DISCUSSION

The taxpayer protests the Department's imposition of the ten percent (10%) penalty assessment. Indiana Code section 68.1-10-2.1 requires a ten percent (10%) penalty to be imposed if the tax deficiency is due to the negligence of the taxpayer. Department regulation 45 IAC 15-11-2 provides guidance in determining if the taxpayer

was negligent in nature.

Departmental regulation 45 IAC 15-11-1(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is also to be determined on a case-by-case basis according to the facts and circumstances of each taxpayer.

Subsection (d) of IC 6-8.1-10-2.1 allows the penalty to be waived upon a showing that the failure to pay the deficiency was due to reasonable cause. Departmental regulation 45 IAC 15-11-2(c) requires that in order to establish reasonable cause, the taxpayer must show that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed. . . ."

In this instance, the taxpayer has shown reasonable cause. The taxpayer has provided to the Department's satisfaction, sufficient justification for interpreting the code as it did.

FINDING

The taxpayer's protest is sustained. The taxpayer has provided to the Department's satisfaction, sufficient justification for interpreting the code as it did.